SYKT. M. MOHAMED

v.

MAHINDAPAL SINGH JOGINDER SINGH & ORS.

HIGH COURT MALAYA, KANGAR
KC VOHRAH J
[CIVIL SUIT NO. 22-23-1988]
30 DECEMBER 1990

CIVIL PROCEDURE: *Notice of motion for committal to prison - Alleged breach of injunction - Defective - Failure to specify precise breaches in notice of motion - Supporting statement and affidavit did contain particulars - Strict compliance with procedure rules - Liberty of subject involved - Similarity with English rules and cases - Rules of High Court 1980, O. 52 r. 3.*

On 8 October 1988, Lim Beng Choon J made an order requesting the defendants to disclose the full value of their assets whether within or without the jurisdiction and the identification of accounts, property or assets held by the defendants by them and/or on their behalf. The plaintiffs M filed a notice of motion (NOM) to commit the defendants to prison for contempt of Court for "breach of that order". The defendants contend that the Court should refuse to make the order of committal since the notice is defective as it fails to specify the precise breaches of the injunction. The NOM with a supporting statement and affidavit was sent to the 1st and 2nd defendants under O. 52 r. 2 of the Rules of the High Court 1980 (RHC).

Held:

[1] (a) The principles as to the English cases, *Chanel* and *Chiltern*, dealt with O. 52 r. 4 of the English Rules of the Supreme Court (RSC) - there is no equivalent Malaysian rule.

(b) The rule in the Malaysian RHC as regards an application for an order of committal is r. 3 of O. 52 which is substantially similar to r. 3 of O. 52 of the English RSC in relation to an application for an order of committal to be made to a Divisional Court.

[2] The application under O. 52 r. 3 RHC (O. 52 r. 3 English RSC) can only be made after leave has been granted under r. 2 and the application, under r. 2(2) (equivalent to r. 2(2) of O. 52 English RSC) for such leave, must be made *ex parte* to the Court and must be supported by a statement and an affidavit.

[3] Unlike r. 4(2) of O. 52 English RSC which requires the notice of motion that has to be served to state the grounds of the application, the requirement in rr. 2(2) and 3(3) (RHC and also English RSC) is for the statement accompanying the notice of motion to state the grounds on which an order of committal is sought against the person. In other words the grounds for which an order of committal is sought appear not in the notice of motion but in the accompanying statement.

[4] The principles and the reasoning underlying the need for the notice of motion under O. 52 r. 4 of the English RSC (which does not require an accompanying statement) to contain enough information with sufficient particularity to enable the person alleged to be in contempt to meet the charge must apply to the need for the statement required under O. 52 r. 2(2) and 3(3) of our RHC to contain such information; since committal proceedings are quasi-criminal proceedings and the liberty of the subject is involved, the procedural rules applicable must be strictly enforced.

[5] The notice of motion has made reference to the affidavit of one M and the affidavit has been served on the defendants but the point is that the document is a wholly separate document from the notice and the statement and its purpose is merely to verify the facts in the statement; it cannot supply the missing grounds which are required to be set out in the statement under r. 2(2) of O. 52 RHC.

[6] In the present motion the statement accompanying the notice of motion does not contain sufficient information as to what the alleged breach is all about.

[Notice of motion dismissed.]

Cases referred to:
Chanel Ltd. v. F.G.M. Cosmetics [1981] Fleet Street Reports 471
Chiltern District Council v. Keane [1985] 2 All ER 188
Harmsworth v. Harmsworth [1987] 3 All ER 816

Legislation referred to:
Rules of the High Court 1980, O. 52 rr. 2(2), 3(3)
Rules of the Supreme Court [UK], O. 52 rr. 3, 4(2), 3(3), 2(2)

For the applicant - R.C. Murugeson; M/s. R.C. Murugeson
For the defendants - Choe; M/s. Syarikat Choe

JUDGMENT

KC Vohrah J:

The motion before me is to commit the 1st and 2nd defendants, partners of Syarikat Pal Bersaudara, to prison or contempt of Court for "breach of injunction" made on 8 October 1988 by the order of Lim Beng Choon J. Since I would be referring to the contents of the notice later and since the notice had been attacked as being defective for its failure on its face to specify the precise breaches of the injunction, the notice of motion, so far as relevant, is reproduced below:

> Take notice that pursuant to the leave of this Honourable Court given on 22 April 1989, this Honourable Court will be moved ... for an order that Mahindapal Singh s/o Joginder Singh and Dhrampal Singh s/o Joginder Singh being partners of Syarikat Pal Bersaudara be committed to prison for their contempt of Court in that the said Mahindapal Singh s/o Joginder Singh and Dhrampal Singh s/o Joginder Singh personally being in breach of injunction made by the order of the Honourable Mr. Justice Lim Beng Choon dated 8 October 1988 whereunder the defendants abovenamed were ordered to:
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> > and each of them do within seven (7) days of the service of this order upon them make and serve on the plaintiffs' solicitor an affidavit disclosing the full value of their assets whether within or without the jurisdiction of this Court, identifying with full particularity the nature of all such assets and their whereabouts and whether the same be held in their own names or held jointly or held by nominees otherwise on their behalf or/on behalf of any of them and without prejudice to the generality of the foregoing specifying:
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> > (i) the identity of all other banks and other accounts in their sole names or jointly held or held by nominees or otherwise on their behalf and the sums standing to their credit in such accounts;
> >
> > (ii) any rural property or their assets money or goods owned by them or any of them and the whereabouts of the same and the names and addresses of all persons who have or may have possession, custody or control of any such assets, money or goods at the date of the service of this order

upon the grounds set forth in the copy statement (*sic*) served herewith used on the application for leave to issue this notice of motion.

The notice of motion also contains a statement that in support of the motion it was intended to read and use the affidavit of Moiz Tahir Ali (the managing partner of the plaintiffs).

It is not disputed that both the 1st and 2nd defendants were served with the notice of motion, a copy of the statement made pursuant to O. 52 r. 2 of the Rules of the High Court (RHC) and the affidavit of Moiz Tahir Ali.

Counsel for the 1st and 2nd defendants argued that since the notice of motion itself did not specify the breaches of the injunction the Court should refuse to make an order of committal and he relies on *Chanel Ltd. v. F.G.M. Cosmetics* [1981] Fleet Street Reports 471. In that case Whitford J refused to make an order of committal as he held the notice of motion for committal before him to be bad because it had failed on its face to specify the precise breaches of the undertaking of which the plaintiffs complained and he also held that it was not sufficient that these breaches were made plain in the affidavits served in the case and in a previous action.

While there is no specific reference in that judgment as to whether the notice of motion was filed under r. 3 or 4 of O. 52 of the English Rules of the Supreme Court (RSC) it seems clear that since the case was not heard in the Divisional Court it was filed under r. 4. There is no equivalent Malaysian rule and I will advert to this later in my judgment.

So far as r. 4 of O. 52 of the English RSC is concerned a more authoritative decision is the Court of Appeal case of *Chiltern District Council v. Keane* [1985] 2 All ER 188. There Sir John Donaldson MR at p. 119 highlighted the need for procedural rules to be strictly complied with where the liberty of the subject is involved:

> I have said sufficient, I think, to make it clear that if ever there was an appeal which, totally lacked the ingredient of merit, it is this one, and Counsel for Mr. Keane of course has not suggested the contrary. However, where the liberty of the subject is involved this Court has time and time again asserted that procedural rules must be strictly complied with.

His Lordship then referred to paras. (2) and (3) of O. 52 r. 4 RSC of which read:

> (2) Subject to para. (3), the notice of motion, stating the grounds of the application and accompanied by a copy of the affidavit in support of the application, must be served personally on the person sought to be committed.
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> (3) Without prejudice to its power under O. 65, r. 4, the Court may dispense with service of the notice of motion under this rule if it thinks it just to do so.

His Lordship continued:

> The notice of motion was personally served on Mr. Keane, but it only stated the grounds of the application to commit in general terms. It recited the undertaking and the injunction, and then alleged that there had been a breach. This, on the authorities, is not sufficient. It has been said in many cases that what is required is that the person alleged to be in contempt shall know, with sufficient particularity to enable him to defend himself, what exactly he is said to have done or omitted to do which constitutes a contempt of Court.
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> The particular undertakings and injunctions in this case cover a wide range of activities. Mr. Keane was entitled to know whether it was said by the council that he was in breach of every single requirement of those orders or only some, and if so which, of them and the notice failed to give him that information.

> Every notice of application to commit must be looked at against its own background. The test, as I have said, is: does it give the person alleged to be in contempt enough information to enable him to meet the charge? If, for example, a defendant is subject to an injunction to leave a stated house not later than a particular time on a particular day, then it would be sufficient to say that he had failed to comply with that order, because it only permits of one breach, namely failure to leave the house by the time stated. But where the order is not in such a simple form and it is possible for the defendant to be in doubt what breach is alleged, then the notice is defective.

In a recent Court of Appeal case, *Harmsworth v. Harmsworth* [1987] 3 All ER 816, Nicholls LJ at p. 821 referred to the above passage and stressed the need for certain basic information, enough information with sufficiently particularly, to appear within the notice of motion (including any addendum forming part of the notice) to enable the person alleged to be in contempt to meet the charge. His Lordship also underscored the principle that deficiencies in the notice of motion cannot be regarded as cured by reason of references in the notice of motion to affidavits attached to or accompanying the notice. His Lordship said:

> So the test is, does the notice give the person alleged to be in contempt enough information to enable him to meet the charge? In satisfying this test it is clear that in a suitable case if lengthy particulars are needed they may be included in a schedule or other addendum either at the foot of the notice or attached to the notice so as to form part of the notice rather than being set out in the body of the notice itself. But a reference in the notice to a wholly separate document for particulars that ought to be in the notice seems to me to be a quite different matter. I do not see how such a reference can cure what otherwise would be a deficiency in the notice. As I read the rules of Court and as I understand the decision in the *Chiltern* case the rules require that the notice itself must contain certain basic information. That information is required to be available to the respondent to the application from within the four corners of the notice itself. From the notice itself the person alleged to be in contempt should know with sufficient particularity what are the breaches alleged A *fortiori*, in my view, where the document referred to is an affidavit, which does not set out particulars in an itemised form, but which leaves the respondent to the committal application to extract and cull for himself from an historical narrative in the affidavit relevant dates and times and so forth, and to work out for himself the precise number of breaches being alleged and the occasions on which they took place.
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> I do not think, therefore, that if there are deficiencies in the notice issued on 22 June, these deficiencies should be regarded as having been cured by reason of the references in para. 1 to the affidavit attached to the notice and in para. 2, to the affidavit accompanying the notice.

As I have stated earlier the cases I have cited have dealt with O. 52 r. 4 of the English RSC to which there is no Malaysian equivalent. The rule in the Malaysian RHC as regards an application for an order of committal is r. 3 O. 52 which is substantially similar to r. 3 of O. 52 of the English RSC in relation to an application for an order of committal to be made to a Divisional Court.

The application under O. 52 r. 3 RHC (O. 52 r. 3 English RSC) can only be made after leave has been granted under r. 2 and the application, under r. 2(2) (equivalent to r. 2(2) of O. 52 English RSC) for such leave, must be made *ex parte* to the Court and must be supported by a statement and an affidavit.

The statement that is required to be filed has to set out the name, description and address of the person sought "**and the grounds on which his committal is sought**." (Emphasis is mine).

As for the affidavit it is to verify the facts relied on.

I now come to r. 3(3) (equivalent to r. 3(3) of O. 52 English RSC) which reads:

> Subject to para. (4), the notice of motion accompanied by a copy of the statement and affidavit in support of the application for leave under r. 2, must be served personally on the person sought to be committed.

Paragraph 4, referred to above, gives the Court power to dispense with service of the motion if it is just to do so and is not relevant here.

It will be noticed that unlike r. 4(2) of O. 52 English RSC which requires, as discussed earlier, the notice of motion that has to be served to state the grounds of the application, the requirement in rr. 2(2) and 3(3) (RHC and also English RSC) is for the statement accompanying the notice of motion to state the grounds on which an order of committal is sought against the person. In other words the grounds for which an order of committal is sought appear not in the notice of motion but in the accompanying statement.

Thus, although there is no requirement for the notice of motion to set out the grounds there is a such requirement in respect of the statement. In my view the principles and the reasoning underlying the need for the notice of motion under O. 52 r. 4 of the English RSC (which does not require an accompanying statement) to contain enough information with sufficient particularity to enable the person alleged to be in contempt to meet the charge must apply to the need for the statement required under O. 52 r. 2(2) and 3(3) of our RHC to contain such information; for at the root of the matter is this that since committal proceedings are quasi-criminal proceedings and the liberty of the subject is involved, the procedural rules applicable must be strictly enforced.

In the present motion the statement accompanying the notice of motion does not contain sufficient information as to what the alleged breach is all about. It gives "the grounds of the application" as:

> That the aforesaid Mahindapal Singh s/o Joginder Singh and Dhrampal Singh s/o Joginder Singh being partners of Syarikat Pal Bersaudara and directors of the 3rd defendants abovenamed respectively and being in breach of the injunction made by the order of the Honourable Justice Mr Lim Beng Choon dated 8 October 1988 whereunder they failed to disclose the assets of their firm of Syarikat Pal Bersaudara
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> and that the abovenamed 1st and 2nd defendants or any one of them have not complied with the said order in the manner aforesaid since the date of personal service of the said order on the 1st and 2nd defendants on 12 October 1988.

What are the breaches alleged? There is merely a general statement that the 1st and 2nd defendants have failed to disclose the assets of their firm of Syarikat Pal Bersaudara. According to the terms of the order the first two and the 3rd defendants had to swear an affidavit by a certain date disclosing various particulars (spelt out in some detail in the order which has been set out in the first paragraph of this judgment) concerning their assets. The defendants are entitled to know what it is that they have breached. Which term of the many terms in the order have they breached? Is it that they have not disclosed all their assets? Or that they have not disclosed the value of the assets? Or that they have not disclosed their full value? Or that they have not specified the nature of the assets? Or that the nature of the ownership of the assets have not been set out? Or that the identity of the banks in which their accounts were kept have not been disclosed? There are other questions which can be asked by the defendants who need to know with particularity what charge or charges they are faced with, charges which can land them in prison. No doubt the notice of motion has made reference to the affidavit of Moiz Tahir Ali and the affidavit has been served on

the defendants but the point is that the document is a wholly separate document from the notice and the statement and its purpose is merely to verify the facts in the statement; it cannot supply the missing grounds which are required to be set out in the statement under r. 2(2) of O. 52 RHC.

In view of the foregoing I cannot make an order on the committal proceedings. The motion is dismissed with costs.

Also found at [1991] 1 CLJ 582